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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TRADEBAY LLC, a Nevada limited liability
company,
vs.
EBAY INC., a Delaware corporation, et al.,
Defendants.

Plaintiff,

CASE NO. 2:11-cv-00702-ECR-PAL
**DEFENDANT EBAY INC.'S REPLY IN
SUPPORT OF MOTION TO STAY
DISCOVERY PENDING DISPOSITION
OF MOTION TO DISMISS**
**EXPEDITED RESOLUTION
REQUESTED¹**

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Preliminary Statement

2 Like its opposition to eBay's underlying motion to dismiss, Tradebay's opposition to the
3 present motion to stay discovery misstates the governing law. While a pending motion to dismiss
4 is not ordinarily a situation that in and of itself would warrant a stay of discovery, a well-
5 recognized exception exists where, as here, the motion to dismiss raises preliminary issues such as
6 jurisdiction, venue or immunity. Tradebay completely—and disingenuously—ignores this well-
7 recognized exception and all of the cases that have applied it in granting a stay of discovery
8 pending disposition of a motion to dismiss that goes to the court's jurisdiction or other preliminary
9 issues. Based on this authority alone, the Court should stay discovery until eBay's pending
10 motion to dismiss and the issue of the Court's jurisdiction to hear this matter has been resolved.

11 Tradebay also ignores other relevant factors considered by courts in deciding motions to
12 stay discovery, all of which weigh heavily in favor of granting a stay here. These include the fact
13 that the pending motion to dismiss will dispose of the entire case and no discovery is needed to
14 decide the motion; the case is merely at the pleading stage, no answer has been filed and no
15 counterclaim is pending; discovery has not yet commenced and there are no other parties to this
16 lawsuit. Tradebay does not dispute any of this. Nor does it articulate any prejudice that would
17 flow from a brief stay until the preliminary issue of jurisdiction can be resolved.

18 Instead, Tradebay devotes the bulk of its opposition to re-hashing its opposition to eBay's
19 underlying motion to dismiss. eBay's motion to dismiss has been fully briefed. As more fully
20 described in eBay's briefing, Tradebay bases its opposition to that motion on misstatements of the
21 law in an attempt to conceal that it has failed to allege facts or otherwise come forward with
22 evidence necessary to establish an Article III case or controversy. Repeating those misguided
23 arguments here does not warrant denying a brief stay of discovery until the preliminary issue of
24 jurisdiction has been resolved.

Finally, for the reasons stated above, eBay requests that the Court decide the motion to stay on an expedited basis.

Argument

**THE COURT SHOULD STAY DISCOVERY PENDING RESOLUTION OF
EBAY'S MOTION TO DISMISS AND THE PRELIMINARY ISSUE OF
JURISDICTION**

5 It is undisputed that eBay's pending motion to dismiss goes directly to the Court's
6 jurisdiction to hear this matter. Yet nowhere in its opposition to the motion to stay discovery
7 does Tradebay even acknowledge, let alone address, the following statement in Twin City Fire Ins.
8 Co. v. Employers Ins. of Wausau, 124 F.R.D. 652 (D. Nev. 1989): "[A] pending Motion to
9 Dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery.
10 Common examples of such situations, however, occur when *jurisdiction, venue, or immunity are*
11 *preliminary issues.*" Id. at 653 (emphasis added) (citations omitted). Nor does Tradebay
12 address any of the numerous cases cited by eBay in which courts have routinely granted stays of
13 discovery pending disposition of motions that go to the court's jurisdiction and other preliminary
14 issues. See, e.g., Kuzova v. U.S. Dep't of Homeland Sec., 2011 WL 3422777, at *2 (D. Nev.
15 Aug. 3, 2011) (granting motion to stay discovery where defendant filed motion to dismiss for lack
16 of subject matter jurisdiction and for failure to state a claim and stating that such a stay in light of
17 the pending "potentially dispositive motion and threshold issues is appropriate as it will prevent
18 the wasting of time and effort of all concerned, and will make the most of efficient use of judicial
19 resources."); Izumi v. Cox Commc'ns Las Vegas, Inc., 2011 WL 3875343, at *2 (D. Nev. Aug. 31,
20 2011) (granting motion to stay discovery and stating "[w]hether a federal court has jurisdiction to
21 hear a case is an important preliminary issue that generally warrants a stay."); Buckwalter v. Nev.
22 Bd. of Med. Examiners, 2011 WL 841391, at *3 (D. Nev. Mar. 7, 2011) (granting motion to stay
23 discovery because "it appears probable that the District Judge will grant Defendants' motion to
24 dismiss on the basis of absolute immunity and because the underlying disciplinary proceedings are
25 not yet complete.").²

²⁷ 2 Tradebay cites Twin City Fire and argues that eBay fails to show "extraordinary justification" for the relief it seeks. (Opp'n at 7.) But, as shown, Tradebay ignores the language from Twin
²⁸ City Fire quoted above and the authority that eBay has cited establishing that requests to stay

1 This authority is directly on point and counsels in favor of a stay of discovery here;
 2 Tradebay ignores it, perhaps hoping the Court will too. Likewise, Tradebay ignores other
 3 relevant considerations set forth in eBay's motion, each of which weighs heavily in favor of a stay
 4 of discovery. These include the fact that the pending motion to dismiss will dispose of the entire
 5 case and no discovery is needed to decide the motion; the case is merely at the pleading stage, no
 6 answer has been filed and no counterclaim is pending; discovery has not yet commenced and there
 7 are no other parties to this lawsuit.

8 Tradebay instead devotes most of its opposition to re-hashing its opposition to eBay's
 9 underlying motion to dismiss. That motion has been fully briefed and eBay has addressed each of
 10 Tradebay's erroneous arguments in detail (see Docket Nos. 12 and 20). eBay will not re-argue its
 11 motion to dismiss other than to again point out that Tradebay stakes its entire opposition to that
 12 motion on a misstatement of the law—that the Supreme Court, the Ninth Circuit and the Federal
 13 Circuit have all "rejected" any requirement that it take concrete steps to actually use its purported
 14 trademark in order to obtain a declaratory judgment of non-infringement. In fact, as
 15 demonstrated in prior briefing, none of them have. To the contrary, the Ninth Circuit has
 16 specifically stated (in the patent context) that "when the plaintiff has not yet begun to manufacture,
 17 or make preparations to manufacture, the patented product[,] . . . the plaintiff is asking the court to
 18 render an advisory opinion whether its product would be infringing a valid patent if the plaintiff . .
 19 . actually proceeds to the manufacturing stage." Societe de Conditionnement en Aluminium v.
 20 Hunter Eng'n Co., 655 F.2d 938, 944 (9th Cir. 1981). This principle—which Tradebay fails to
 21 address in any of its briefs—has been re-affirmed by the Federal Circuit in decisions since the
 22 Supreme Court's opinion in MedImmune, which makes clear that the relevant question in each
 23 case is whether the facts alleged, under all of the circumstances, show that there is a substantial
 24 controversy of "sufficient immediacy and reality" to warrant the issuance of a declaratory
 25 judgment. Tradebay makes no attempt to show that it has alleged anything other than a vague
 26 and indefinite desire to use the TRADEBAY mark at some future date. Indeed, Tradebay does
 27 discovery are routinely granted when, as here, a motion to dismiss raises a preliminary issue
 28 regarding the court's jurisdiction.

1 not dispute that it has failed to allege, let alone come forward with any evidence of, concrete steps
2 to use the mark that would establish a justiciable controversy.³ In short, there is every reason to
3 believe that eBay's motion to dismiss will be granted in due course.

4 Tradebay's reliance on Clemons v. Hayes, 2011 U.S. Dist. LEXIS 56739 (D. Nev. May 26,
5 2011), misses the mark. Unlike this case, Clemons did not involve a motion to dismiss based a
6 preliminary issue such as jurisdiction, venue or immunity. For that reason alone it has no
7 application here. In any event, the court actually granted the motion to stay discovery pending
8 disposition of the motion to dismiss, stating not that there was "no question" the motion would be
9 granted but rather that it was "likely" that one claim would be dismissed based on the lack of a
10 right of action, "unlikely" that another claim would "survive the pending motion to dismiss" based
11 on an inadequacy of the allegations, and that there was "little question" that yet another claim
12 would be dismissed based on a procedural deficiency. Clemons, 2011 U.S. Dist. LEXIS 56739,
13 at *7-12. In short, Clemons provides no support for denying a stay of discovery here.

14 Tradebay has failed to articulate any prejudice from a short stay of discovery pending
15 resolution of whether this Court even has jurisdiction to hear this matter. On the other hand, a
16 stay of discovery pending disposition of this preliminary issue will "prevent the wasting of time
17 and effort of all concerned, and will make the most efficient use of judicial resources." Kuzova,
18 2011 WL 3422777, at *2.

Conclusion

20 For the foregoing reasons, eBay respectfully requests that the Court enter an order staying
21 discovery pending disposition of eBay's motion to dismiss and the preliminary issue of whether
22 the Court has jurisdiction to hear this matter.

³ Instead, Tradebay focuses on the wrong issue, stating that "eBay takes the position that Tradebay has failed to present a live case or controversy because eBay had not made an actual threat of litigation." (Opp'n at 6.) Even a cursory review of the motion to dismiss briefing shows that is not the basis for eBay's motion and ignores the real issue—whether Tradebay has taken concrete steps to use the mark in issue. It clearly has not.

1 RESPECTFULLY SUBMITTED this 19th day of October, 2011.
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